(6)

No. 03-1407

IN THE

Supreme Court of the United States

RICHARD GERALD ROUSEY AND BETTY JO ROUSEY,
Petitioners,

v.

JILL R. JACOWAY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a debtor's right to receive payment from an individual retirement account—when the account is structured to permit the debtor to withdraw funds from the account at any time and for any reason, subject only to a minor penalty—is exempt from the reach of creditors in bankruptcy under 11 U.S.C. § 522(d)(10)(E) on the grounds that the account is "similar" to a "stock bonus, pension, profit-sharing [or] annuity" plan and that the right to payment is "on account of illness, disability, death, age, or length of service."

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BRIEF FOR RESPONDENT

STATUTORY BACKGROUND

1. Outside of bankruptcy, the rights of creditors to reduce their claims against a debtor to judgment, and to execute a judgment against a debtor's assets, are governed by state law. Accordingly, state law typically determines the means by which a creditor is permitted to enforce a debt, and prescribes which assets are exempt from the reach of creditors. *See, e.g., Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974) (rejecting due process challenge to Louisiana procedure for sequestering personal property); *James* v. *Strange*, 407 U.S. 128, 135 (1972) (describing Kansas exemptions for

"furnishings, food, fuel, clothing, means of transportation, pension funds, and . . . a family burial plot or crypt").

Federal law, of course, may preempt state law on debtor-creditor relations. To that end, for example, the Tax Code expressly grants the Internal Revenue Service the authority to levy against assets that may otherwise be exempt under state law. *See* 26 U.S.C. §§ 6331, 6334; *United States* v. *Mitchell*, 403 U.S. 190, 205 (1971) ("state law which exempts a husband's interest in community property from his premarital debts does not defeat collection of his federal income tax liability for premarital tax years from his interest in the community [property]"). Similarly, in *Guidry* v. *Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990), this Court held that certain ERISA pension benefits were not subject to garnishment by creditors—even victims of embezzlement—on account of statutory language providing that "benefits provided under the [ERISA] plan[s] may not be assigned or alienated." 29 U.S.C. § 1056(d)(1).

2. Prior to the 1978 enactment of the Bankruptcy Code, a debtor's right to exempt property remained a matter of non-bankruptcy law (typically state law), even in bankruptcy. *See* Bankruptcy Act of 1898, § 6 (1898); David A. Skeel, *Debt's Dominion: A History of Bankruptcy Law in America* 151 (2001) ("In the debates leading up to the 1898 act, lawmakers had taken as a given that state lawmakers would be the ones to determine how much property debtors could exempt.").

The 1978 Bankruptcy Code, however, created a "cooperative federalism" scheme of exemption law. Specifically, Section 522 of the Bankruptcy Code permits a debtor to choose between a set of federal exemptions set forth in the Bankruptcy Code and the state law exemptions of the state in which the debtor is domiciled. *See* 11 U.S.C. § 522(b)(2). In addition, the Bankruptcy Code authorizes states to "opt out" of the federal exemption scheme, in which case debtors

are limited to those exemptions available under state law. *See* 11 U.S.C. § 522(b)(1).[1]

3. The question of which property is exempt from the reach of creditors is critical in a chapter 7 bankruptcy. A chapter 7 bankruptcy is intended to rationalize the process whereby various creditors assert claims against a debtor's assets. If a debtor is unable to pay his or her debts in full, chapter 7 avoids the race to the courthouse that results in the debtor's assets going to the first creditor able to execute on a judgment. Rather, a trustee is appointed under the Bankruptcy Code and is charged with the responsibility for liquidating the debtor's assets and distributing them to creditors *pro rata*, in accordance with a statutory priority scheme. *See* 11 U.S.C. §§ 704, 726.

Section 541 of the Bankruptcy Code provides that all of the debtor's interests in property as of the filing of the bankruptcy case become "property of the estate." *See* 11 U.S.C. § 541(a)(1) (debtor's estate includes nearly "all legal and equitable interests of the debtor in property as of the commencement of the case").[2] This "estate" is administered by the trustee, who is charged with liquidating the property and distributing it to creditors. At the conclusion of a chapter 7 bankruptcy, a debtor will typically receive a discharge of all prepetition debt. *See id.* § 727. The discharge provides the debtor with a "fresh start"—the ability to move forward unencumbered by debt that was incurred prior to the bankruptcy, and to earn (and keep) future income without paying

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[1] The debtors in this case are Arkansas residents. Arkansas "opted in" to the federal exemptions. *See* Ark. Code Ann. § 16-66-217. The debtors were therefore permitted to choose between exempting the property set out in Section 522(d) of the Bankruptcy Code or electing the exemptions provided under Arkansas law.

[2] A chapter 7 bankruptcy debtor is required to disclose upon the appropriate schedules all property which the debtor owns or in which he has an ownership interest. Fed. R. Bankr. P. 1007(b)(1).

that prepetition debt. But this discharge comes at a price. Specifically, in exchange for this "fresh start," a debtor is required to turn over all of his nonexempt property to the trustee. *See Ohio* v. *Kovacs*, 469 U.S. 274, 284 n.12 (1985) (explaining the role of a trustee in a chapter 7 bankruptcy, including the responsibility to collect and distribute to creditors the debtor's nonexempt property).

4. The exemptions contained in Section 522(d) of the Bankruptcy Code, like the exemptions that typically exist under state law, are intended to provide the debtor with basic necessities and to effectuate a "fresh start" by making it possible for the debtor to earn future income. *See United States* v. *Security Indus. Bank*, 459 U.S. 70, 83 (1982) (Blackmun, J., concurring) ("Section 522 . . . [like] all similar statutes, was enacted to protect the debtor's essential needs and to enable him to have a fresh start economically.").

To that end, Section 522(d) provides exemptions for, among other things: the debtor's interest, up to $18,450 in value, in real or personal property used as a residence, *see* 11 U.S.C. § 522(d)(1); the debtor's interest, not to exceed $2,950 in value, in a motor vehicle, *see id.* § 522(d)(2); and the debtor's interest, not to exceed $1,225 in value, in jewelry, *see id.* § 522(d)(4). In addition, the so-called "wild card" exemption of Section 522(d)(5) permits the exemption of the debtor's interest in any property up to $975, plus up to $9,250 of any unused amount of the exemption for a residence provided in Section 522(d)(1). *See id.* § 522(d)(5).

5. The specific exemption at issue herein is set forth at Section 522(d)(10)(E). That section provides that a debtor may exempt his:

> right to receive—
>
> * * * *
>
> (E) a payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless—
>
> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
>
> (ii) such payment is on account of age or length of service; and
>
> (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

11 U.S.C. § 522(d)(10)(E).

6. In addition to the "exemptions" provided in Section 522, other property is "excluded" from the bankruptcy estate under Section 541 of the Bankruptcy Code. For example, property in which the debtor holds bare legal title in trust for a third party is excluded from the bankruptcy estate under Section 541. *See United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 204 n.8 (1983) ("Congress intended to exclude from the estate property of others in which the debtor had some minor interest such as a lien or bare legal title"); *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 213 (2002) (noting that "in the eyes of equity" the beneficiary of a constructive trust is "the true owner").

Property in a trust that cannot be alienated—or transferred to any third person—under applicable law is also excluded from the bankruptcy estate. *See* 11 U.S.C. § 541(c)(2). For this reason, this Court held in *Patterson* v. *Shumate*, 504 U.S. 753 (1992), that a debtor's interest in a pension plan established pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA") was not property of the debtor's estate in bankruptcy. Because ERISA requires that "benefits provided under the plan may not be assigned or alienated," 29 U.S.C. § 1056(d)(1), and because the Bankruptcy Code states that a "restriction on the transfer of a beneficial interest of the debtor in a trust that is en-

forceable under applicable nonbankruptcy law is enforceable in a case under this title," 11 U.S.C. § 541(c)(2), the *Patterson* Court concluded that the "antialienation provision required for ERISA qualification . . . constitutes an enforceable transfer restriction for purposes of § 541(c)(2)'s exclusion of property from the bankruptcy estate." 504 U.S. at 760. Following *Patterson*, lower courts have uniformly held that ERISA-qualified plans are excluded from the debtor's bankruptcy estate.[3]

7. Individual Retirement Accounts, or "IRAs," were originally introduced by ERISA as part of a broad reform of the nation's private pension system. *See* Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 2002, 88 Stat. 829, 958-966 (codified as amended at 26 U.S.C. § 219, 408 (2000)).[4]

IRAs were originally intended to "offer a tax incentive to encourage individuals who [did] not participate in retirement plans to set aside a portion of their current income for retirement savings." 119 Cong. Rec. 28,652 (1973) (statement of Sen. Bentsen, the sponsor of S. 1179). From their

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[3] *See, e.g., In re Sewell*, 180 F.3d 707, 712-713 (5th Cir. 1999); *Harshbarger* v. *Pees (In re Harshbarger)*, 66 F.3d 775, 777 (6th Cir. 1995); *Iannacone* v. *Northern States Power Co. (In re Conlan)*, 974 F.2d 88, 89 (8th Cir. 1992); *Manufacturers Bank & Trust Co.* v. *Holst*, 197 B.R. 856, 859 (N.D. Iowa 1996); *In re Bennett*, 185 B.R. 4, 6 (Bankr. E.D.N.Y. 1995); *In re Hanes*, 162 B.R. 733, 738 (Bankr. E.D. Va. 1994).

[4] When IRAs were introduced, defined benefits plans dominated the pension landscape in the United States. *See* Susan J. Stabile, *Paternalism Isn't Always a Dirty Word: Can the Law Better Protect Defined Contribution Plan Participants?*, 5 Employees Rts. & Emp. Pol'y J. 491, 492 (2001). A traditional defined benefits plan requires an employer (or trust) to pay an employee upon retirement a predetermined amount (or an amount according to a predetermined formula). *See id.* at 494-495. Under the other form of pension plan, a defined contribution plan, much less common at the time, an employer or employee makes contributions to the plan on behalf of the employee, who is entitled to receive the value of the account upon retirement. *See id.*

creation in 1974, however, IRAs differed from traditional pension plans in one very important respect—IRAs permitted unrestricted access to the savings they contained prior to retirement, while traditional pension plans did not. *See, e.g.*, Patricia E. Dilley, *Hidden in Plain View: The Pension Shield Against Creditors*, 74 Ind. L.J. 355, 418 (1999).

IRAs come in many forms, including: (1) individual retirement accounts qualifying under 26 U.S.C. § 408(a) (referred to herein as "standard IRAs" or "408(a) IRAs"); (2) individual retirement annuities qualifying under 26 U.S.C. § 408(b) purchased from an insurance company; (3) employer-sponsored IRAs qualifying under 26 U.S.C. § 408(c) (which may be established under either 26 U.S.C. § 408(a) or § 408(b)); (4) Simplified Employee Pension IRAs qualifying under 26 U.S.C. § 408(k); and (5) many relatively newer forms of IRAs including SIMPLE IRAs, Deemed IRAs, Roth IRAs, Educational IRAs. *See* 26 U.S.C. §§ 408(p), 408(q), 408A, 530.

A standard IRA is the most common form of IRA (and the form of IRA at issue herein). A standard IRA may be established at almost any bank or financial institution by an individual opening an account that meets certain requirements. An individual may deposit up to $3,000 (for 2004) per year in cash into such an account, or, as in this case, "roll over" funds from a qualified pension plan after termination from prior employment.

Unlike traditional pension plans, the individual maintains complete control over a standard IRA, including the ability to withdraw some or all of the account proceeds at any time, for any reason, subject only to a 10 percent tax penalty. The ability to access any or all funds in a standard IRA at any time is the hallmark that makes standard IRAs different from traditional pension plans:

> The qualified plan requirements of the Code . . . require behavior from employees—essentially deferral of compensation until retirement—that individ-

> ual employees might not choose to engage in if given the choice. IRAs, on the other hand, are established, contributed to, and maintained almost solely at the discretion of the individual. The choice to immediately consume all or a part of the amounts held in the IRA, rather than waiting for retirement, involves a monetary penalty but no disqualification of the trust [as with qualified plans].

Dilley, *supra*, 74 Ind. L.J. at 429.[5] In addition, unlike traditional pension plans, IRAs allow funds to be withdrawn without any tax penalty for the purchase of a first home, 26 U.S.C. § 72(t)(2)(F), for medical care insurance premiums, *id.* § 72(t)(2)(D), and for qualified higher education expenses, *id.* § 72(t)(2)(E). For all these reasons, IRAs have become a tool to stimulate savings in many forms, rather than just retirement savings. *See* Richard L. Kaplan, *Retirement Funding and the Curious Evolutions of Individual Retirement Accounts*, 7 Elder L.J. 283, 285 (1999) (IRAs "have transmogrified . . . into all-purpose investment kitties that can be used for purposes that have little connection to the holder's retirement").

STATEMENT OF THE CASE

1. Richard Gerald Rousey and Betty Jo Rousey filed their joint chapter 7 bankruptcy petition, with accompanying schedules and statements, in the United States Bankruptcy Court for the Western District of Arkansas on April 27, 2001. Pet. App. 20a. On the date of filing, Jill R. Jacoway was appointed by the bankruptcy court to serve as the chapter 7 trustee in the case. *Id.* at 8a.

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[5] *See also* Treas. Reg. § 1.401-1(a)(2)(i), 1.401-1(b)(1)(i), 1.401-1(b)(1)(ii), 1.401-1(b)(1)(iii) (providing that pension, profit-sharing, and stock bonus plans should be based on providing income upon or after retirement).

The Rouseys disclosed in their schedules that they had ownership interests in two IRAs. Pet. App. 20a. As of the date of the bankruptcy filing, each of the Rouseys owned an IRA on deposit with the First National Bank of Berryville, Arkansas. Richard Gerald Rousey's Individual Retirement Account Certificate of Deposit No. 208221 had a value of $42,915.32. *Id.* Betty Jo Rousey's Individual Retirement Account Certificate of Deposit No. 208345 had a value of $12,118.16. *Id.*

The Rouseys claimed these accounts as exempt, listing the accounts on "Schedule C - Property Claimed as Exempt." Pet. App. 20a. Richard Gerald Rousey exempted $5,033.00 of the value of his IRA under the "wildcard exemption," 11 U.S.C. § 522(d)(5), and claimed the remaining $37,882.32 as exempt pursuant to Section 522(d)(10)(E). Betty Jo Rousey exempted $5,648.00 of the value of her IRA pursuant to Section 522(d)(5), and claimed the remaining amount of $6,470.10 as exempt under Section 522(d)(10)(E). *See id.*

On August 3, 2001, the trustee filed an objection to the Rouseys' claims of exemption, and moved the bankruptcy court to direct the debtors to turn over to the trustee that portion of the IRAs that they claimed as exempt pursuant to Section 522(d)(10)(E). *See* Pet. App. 20a.[6] By order dated February 13, 2002, the bankruptcy court granted the trustee's motion. *See id.* at 35a.

The bankruptcy court held that Section 522(d)(10)(E) required that the petitioners' IRAs must be "similar plans or contracts" to "a stock bonus, pension, profitsharing, [or] annuity" plan, and that the debtors' rights of payment must be "on account of illness, disability, death, age, or length of service" to qualify for the exemption. "If any of the conditions

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[6] The Trustee's objection was not addressed to amounts the Rouseys claimed as exempt under Section 522(d)(5). *Id.* at 21a.

of the exemption are not met, Debtors may not claim the exemption." Pet. App. 26a. The court held that the Rouseys' IRAs did not qualify as "similar plans or contracts" within the meaning of the statute and that the Rouseys' ability to withdraw funds from the accounts at their discretion rendered their right to payment from the IRAs not "on account of illness, disability, death, age, or length of service." *Id.* at 34a-35a.

2. The Bankruptcy Appellate Panel for the Eighth Circuit Court of Appeals affirmed the bankruptcy court. Pet. App. 17a. The court acknowledged that the Rouseys' IRAs were initially funded by a rollover from a former employer's pension plan. The court nevertheless concluded that because the Rouseys could access the funds in the account at any time, for any reason, subject only to a tax penalty, the IRAs were not "similar" to pensions or annuities, which serve as "wage substitutes after retirement." *Id.* at 11a. Further, the Rouseys' "unfettered discretion" to withdraw the funds from the IRAs meant that their right to payment from the accounts was not "on account of illness, disability, death, age, or length of service." *Id.* at 17a. In denying the Rouseys' claim of exemption, the court reasoned that Section 522(d)(10)(E) does not create a rule that IRAs are "per se" ineligible for the exemption. Rather, the plain language of the statute requires only that the debtor's accounts "meet the requirements under 11 U.S.C. § 522(d)(10)(E) in order for IRA funds to be exempt under that provision." *Id.* at 16a. Accordingly, whenever a trustee challenges a claim of exemption in an IRA, the bankruptcy court is required to examine the nature of the debtor's right to payment from the particular account and determine whether the statutory requirements are satisfied.

3. The United States Court of Appeals for the Eighth Circuit unanimously affirmed the judgment of the Bankruptcy Appellate Panel. Pet. App. at 6a. The Court of Appeals found that the express reference to Section 408 of the Internal Revenue Code in Section 522(d)(10)(E) suggests

that "Congress probably intended some IRAs" to be exempt, but noted that if Congress intended to exempt all IRAs, "it would have been a very easy legislative task to have affirmatively accomplished." *Id.* at 5a-6a. Because petitioners' IRAs were like "readily accessible savings accounts of which the debtors may easily avail themselves (albeit with some discouraging tax consequences) at any time for any purpose," their rights to payment were not "triggered by illness, disability, death, age, or length of service," and therefore did not qualify for exemption. *Id.* at 6a. The petitioners timely requested a rehearing en banc, which was denied. *Id.* at 36a. This Court granted certiorari. ___ U.S. ___, 124 S. Ct. 2817 (2004).

SUMMARY OF ARGUMENT

The statutory questions presented by this case are: (a) whether the Rouseys' "right to receive . . . a payment" from their IRAs is "on account of illness, disability, death, age, or length of service," and (b) whether their IRAs are "similar" to a "stock bonus, pension, profitsharing, [or] annuity" plan.

First, the Rouseys' "right to receive . . . a payment" from their IRAs is not "on account of" their age or any of the other specified factors. Rather, they are entitled to withdraw every dollar that is in their IRAs at any time, for any reason. While it is true that the Rouseys would be required to pay a tax penalty if they withdrew from their IRAs prior to reaching the age of 59½, or if they were not buying a first home or paying medical care insurance premiums or college expenses, *see* 26 U.S.C. § 72(t)(2)(A)(i), 72(t)(2)(D)-(F), their right to withdraw funds from their IRAs is not linked to their age.

Rather, the very most that can be said to be "on account of" the Rouseys' age is their right to avoid the tax penalty. But because the statutory language focuses on their "right to receive . . . a payment"—and because it is not disputed

that the Rouseys enjoy (and have enjoyed) such a right without regard to their age—the plain language of the statute compels the conclusion that the Rouseys' rights in connection with their IRAs are not exempt from the reach of creditors.

Second, for related reasons, the Rouseys' IRAs are not "similar" to the plans or contracts identified in the statute. The hallmark of each of those plans is that the beneficiary of such a plan is denied unrestricted access to those funds prior to a specific triggering event. For this reason, an individual's "right to receive . . . a payment" under such a plan will necessarily serve as a form of replacement income. Standard IRAs, however, operate more like savings accounts. Like any savings account, the corpus of those funds is accessible at any time. And while it is true that Congress (or an individual debtor) may intend that those savings be used to pay for retirement, that intention alone is insufficient to put those funds outside the reach of creditors in bankruptcy. While saving for retirement is surely a laudable goal, an individual is not permitted to keep his or her retirement savings—while creditors go unpaid—and at the same time maintain the right to access those funds at any time and for any reason. Because a standard IRA operates more like a savings account than it does like a traditional pension plan, it is not "similar" to the types of pension plans specified in Section 522(d)(10)(E).

Third, the Rouseys are incorrect in arguing that requiring that their "right to receive . . . a payment" from their IRAs in fact be "on account of age" would render the "unless" clause of Section 522(d)(10)(E) superfluous. It is certainly true that the "unless" clause's express reference to Section 408 of the Internal Revenue Code carries an inference that *some* IRAs may fit within the statutory exemption. But it by no means implies that *all* rights to payment from IRAs must be exempt.

Indeed, there are a variety of different types of IRAs authorized by Section 408. Individuals and their banks or financial institutions may structure an IRA so that the right to payment from such account is on account of age, or they may structure it (as here) so that the individual has an unrestricted right to access the funds at any time. Because the Rouseys chose to open IRAs that permitted them access to the corpus of the accounts at any time, it is neither surprising nor unfair that such funds—like other savings—will be reachable by creditors in bankruptcy.

Finally, it is significant that under federal non-bankruptcy law, and under state law as it existed at the time that Section 522(d)(10)(E) was enacted, IRAs were generally not exempt from the reach of creditors. In view of the deference that the exemption scheme of Section 522 demonstrates to state law rights, it would be surprising to ascribe to Congress an unspoken intent to take assets that were otherwise reachable by creditors outside of bankruptcy and render them exempt in bankruptcy.

ARGUMENT

I. THE ROUSEYS DO NOT HAVE A "RIGHT TO RECEIVE A PAYMENT" "ON ACCOUNT OF ILLNESS, DISABILITY, DEATH, AGE, OR LENGTH OF SERVICE."

Section 522(d)(10)(E) permits the debtor to exempt a "right to receive . . . a payment under a [qualifying retirement plan] *on account of illness, disability, death, age, or length of service*." 11 U.S.C. § 522(d)(10)(E) (emphasis added). Because the Rouseys are free to withdraw funds from their IRAs at any time, for any reason or no reason, their "right to receive a payment" from their IRAs is not "on account of . . . age."

The plain meaning of the term "on account of" necessarily requires a causal nexus between the "right to receive a payment" and one of the circumstances that the statute identifies. Put simply, to say that the debtor's "right to re-

ceive a payment" is "on account of age" means, in ordinary English, that the debtor is to receive a payment *because of* the debtor's age.

But in the case of a standard IRA, the debtor is entitled to withdraw funds from that account—that is, the debtor has a "right to receive a payment" from that account—without regard to the debtor's age or any of the other specified statutory circumstances. The Rouseys' IRAs permit such unrestricted access to the funds in the accounts, subject only to a 10 percent tax penalty. The right to payment from the Rouseys' accounts thus exists without regard to their health, disability status, mortality, or age.

To be sure, once the Rouseys reach age 59½, they may withdraw funds from their IRAs without tax penalty (as they may also do in order to purchase a house or pay for college or medical insurance premiums). *See* 26 U.S.C. § 72(t). But it is only the Rouseys' ability to avoid that tax penalty—and *not* their underlying right to payment—that is in any sense attributable to their age. Since the Rouseys' right to payment from their IRAs bears no relationship to their age or any of the other statutory factors, it is not exempt within the meaning of Section 522(d)(10)(E).

The Rouseys hardly even attempt to argue that the "on account of age" requirement is satisfied here. Rather, they would read that plain requirement out of the statute altogether, on the ground that reading the statute to mean what it says—that a right to receive a payment is exempt only if it arises "on account of" the debtor's age (or another specified factor)—would disqualify rights to payment under retirement plans other than IRAs from exemption. Pet. Br. 10-11. *But see Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992) (Congress "says in a statute what it means and means in a statute what it says there"); *see also United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (in interpreting Bankruptcy Code, observing that "where . . . the statute's language is plain, the sole function of the courts

is to enforce it according to its terms") (internal quotation marks omitted).

But, in any event, the premise of the Rouseys' argument—that the other types of pension plans mentioned in Section 522(d)(10)(E) are similar to IRAs in permitting withdrawals for reasons other than retirement—is incorrect. Enforcing the "on account of" requirement according to its terms therefore would not have the dire consequences that the Rouseys suggest. The trademark characteristic of a traditional pension plan is that it pays upon reaching retirement age. *See* Treas. Reg. § 1.401-1(a)(2)(i), 1.401-1(b)(1)(i), 1.401-1(b)(1)(ii), 1.401-1(b)(1)(iii) (providing that pension, profit-sharing and stock bonus plans should be based on providing income upon or after retirement). IRAs, unlike any of the other plans listed in the statute, permit the holder to have unrestricted access to the funds for any reason at all, subject only to a 10 percent tax penalty. It is certainly true that the other plans may permit withdrawals in certain specific circumstances that do not turn on age. But none of those plans provides a debtor with complete unfettered access to all of the funds at any time.[7] A right to receive a payment from a traditional pension plan may therefore arise "on account of age"—even if it may also in certain specific circumstances arise "on account of" other factors—whereas the Rouseys' right to payment from their IRAs exists without regard to any specific triggering factor, and therefore cannot be said to be "on account of" age.

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[7] The Rouseys contend that the "same provision of the Internal Revenue Code (Section 72(t)) that addresses early withdrawals from IRAs . . . applies equally to all 'qualified retirement plans'." *See* Pet. Br. 11. That is incorrect. In fact, that section of the Internal Revenue Code permits early withdrawals without tax penalty that are unique to IRAs—including for buying a first home, for health care insurance premiums, or for education. *See* 26 U.S.C. § 72(t)(2)(D)-(F). The more relevant point, however, is that only IRAs permit the account holder to withdraw funds at any time and for any reason.

A. This Court Has Already Held That The Term "On Account Of," As Used In Section 522(d)(10)(E), Means "Because Of."

That "on account of" means "because of" is well settled. Indeed, this Court previously pointed to the very use of the "on account of" language in Section 522(d)(10)(E) in holding that this term, when used in the Bankruptcy Code, carries the "common understanding" of the term, meaning "because of." *See Bank of Am. Nat'l Trust & Sav. Ass'n* v. *203 North LaSalle St. P'ship*, 526 U.S. 434, 450-454 (1999).

203 North LaSalle involved what is known as bankruptcy's "absolute priority rule," which prevents a junior class of creditors or shareholders from being paid on its claims unless the senior class either consents to its treatment or is paid in full. Specifically, the Bankruptcy Code states that a chapter 11 plan of reorganization must provide that "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan *on account of* such junior claim or interest any property" unless it consents or is paid in full. 11 U.S.C. § 1129(b)(2)(B)(ii) (emphasis added). In other words, the absolute priority rule "bars a junior interest holder's receipt of any property on account of his prior interest." *203 North LaSalle*, 526 U.S. at 437.

The question in *203 North LaSalle* was whether the absolute priority rule was violated by a plan that gave prior equity holders (and no one else) the right to purchase an equity interest in the reorganized debtor. In support of the view that such a plan complied with the statute, the prior equity holders contended that "on account of" meant "in exchange for." Accordingly, the equity holders argued, so long as they were providing new consideration for the equity of the reorganized debtor, they were not receiving the stock "on account of" their prior equity position. Rather, their new interest in the reorganized debtor was provided "on account of" the new payment they were making.

This Court rejected that position, holding that so long as there is a causal connection between the old interest and the distribution of value under the plan, that distribution is "on account of" the prior interest, and thus in violation of Section 1129(b)(2)'s absolute priority rule. If the prior equity holders were receiving an opportunity to purchase shares of the reorganized debtor that was not available to others, their new interest was, at least in part, "on account of" their prior equity interest.

In so holding, the Court noted that the Bankruptcy Code used the term "on account of" five different times, including the instance that is at issue here in Section 522(d)(10)(E). Each of those uses, the Court held, supported the view that the term should have a meaning consistent with "the more common understanding . . .'because of'." *Id.* at 451.

The foundation of the argument advanced by the Rouseys and their *amicus* is that the factors listed in Section 522(d)(10)(E) are non-exclusive. They contend that the court of appeals was wrong to hold that the right to payment must be "on account of" age, or another statutory factor, and *only* on account of those factors. *See* Pet. Br. 10; Amicus Br. 20-24. But that answers the wrong question. The Rouseys' right to payment from their IRAs does not arise on account of age *and* on account of another factor. Rather, an individual's right to withdraw from a standard IRA does not arise "on account of age" at all. It is the right to avoid a tax penalty—not the right to receive payment from the account—that arises on account of age (and other factors).

B. Outside Of The Bankruptcy Code, This Court Has Held That "On Account Of" Requires A Strong "Causal Connection."

In other contexts, this Court has made clear that the term "on account of" requires a "strong[] causal connection." *O'Gilvie* v. *United States*, 519 U.S. 79, 83 (1996).

The question in *O'Gilvie* was whether punitive damages resulting from a product liability award were excludable from the taxpayer-recipient's gross income under Section 104(a)(2) of the Internal Revenue Code. Section 104(a)(2) excludes from taxable gross income the "amount of any damages received . . . *on account of* personal injuries or sickness." 26 U.S.C. § 104(a)(2) (emphasis added). The taxpayer contended that the punitive damage award was "on account of personal injuries" because the personal injury was a "but for" cause of the award. 519 U.S. at 82. This Court rejected that reading of "on account of," adopting the Government's position that punitive damages were not "on account of" a personal injury, but rather were "on account of" defendant's reprehensible conduct. *Id.* at 83. The term "on account of," the Court specifically held, "impose[d] a stronger causal connection" than mere "but for" causation. *Id.*

Similarly, in *Commissioner of Internal Revenue* v. *Schleier*, 515 U.S. 323 (1995), a case addressing the same provision of the Internal Revenue Code, the Court held that a back pay settlement award under the Age Discrimination in Employment Act of 1967 was not "on account of" a personal injury. *See id.* There, the taxpayer commenced an age discrimination action arising out of his termination and argued that the resulting settlement award was excludable from his taxable income. This Court rejected that contention, explaining that when a victim of age discrimination recovers lost wages, such recovery "does not fall within [the] § 104(a)(2)[] exclusion because it does not satisfy the critical element of being 'on account of personal injury or sickness.'" *Id.* at 330. The Court added that "[i]n age discrimination, the discrimination causes both personal injury and loss of wages, but neither is linked to the other." *Id.*

The causal relationship between the Rouseys' right to payment from their IRAs and their age is certainly weaker than the connection between the damages awards in *O'Gilvie* and *Schleier* and the taxpayers' personal injuries. In those

cases, personal injury was at least a "but for" cause or closely-related cause of the taxpayers' claims. This Court nevertheless found that degree of causation insufficient, finding that another cause was more proximately responsible for the awards.

It thus follows *a fortiori* from *O'Gilvie* and *Schleier* that the "on account of" requirement cannot be satisfied here, where there is no causal relationship at all. The Rouseys' age is not even a "but for" cause of their "right to payment" from their IRAs—they enjoy such a right regardless of their age. Rather, the most that can be said is that the Rouseys' right to avoid taxes by waiting until they reach the age of 59½ to receive a payment from their IRAs is "on account of" their age. But that is a very different question from the one posed by the statute.

C. The Structure Of Section 522(d)(10) Demonstrates Congress's Intent To Require A Causal Connection Between The Right To Payment And The Triggering Event.

The structure of Section 522(d) of the Bankruptcy Code supports the view that a direct causal link must be shown between the debtor's right to payment and the triggering condition in order to fall within the exemption.

The Rouseys and their *amicus* contend that because IRAs are generally intended to provide retirees with a source of income in retirement, that is sufficient to bring the right to payment from those accounts within the scope of the exemption. But an examination of Section 522(d) itself makes clear that in drafting the exemptions set out in Section 522(d), Congress certainly knew how to impose a more general requirement of a connection between a debtor's property and the exempt purpose, and chose the more demanding "on account of" formulation with respect to the right to payment at issue here.

For example, Section 522(d)(4) provides an exemption for "the debtor's aggregate interest, not to exceed [$1,150] in

value, in jewelry held *primarily* for personal, family, or household use of the debtor or a dependent of the debtor." *See* 11 U.S.C. § 522(d)(4) (emphasis added). In this context, the fact that the jewelry might also be put to another purpose does not render it non-exempt—the requirement is only that it is held "primarily" for personal, family, or household use.

This is essentially the reading that the Rouseys and their *amicus* would engraft on Section 522(d)(10)(E). That is, notwithstanding the fact that the Rouseys have a present right to payment out of their IRAs without regard to their age or their satisfaction of the other statutory conditions, the Rouseys contend that their right to payment is exempt because a "primary" purpose of an IRA is to provide retirement benefits. *See* Pet. Br. 16-22; Amicus Br. 16-20. But Section 522(d)(4) makes clear that Congress certainly knew how to say that, but chose the more demanding "on account of" language in Section 522(d)(10)(E). There is no reason to read this clear statutory language to mean anything other than what it says.

D. The Drafting History of Section 522(d)(10)(E) Provides Further Support For The Natural Reading Of "On Account Of."

The legislative history refutes the Rouseys' contention that it is sufficient that IRAs' general purpose is to provide for retirement. Indeed, Congress considered, and expressly rejected, a legislative proposal that would have done exactly that.

The 1973 National Bankruptcy Review Commission's prior version of Section 522(d)(10)(E) exempted the debtor's rights "[b]efore or after retirement, . . . [under a retirement plan] *for the primary purpose of* providing benefits upon retirement by reason of age, health, or length of service." Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, at 172 (1973) ("1973 Commission Report") (emphasis added).

Congress, however, chose not to adopt that language, instead providing that the debtor's "right to payment" is exempt only insofar as that right is "on account of" illness, disability, death, age, or length of service. 11 U.S.C. § 522(d)(10)(E). By requiring that the "right to payment" be "on account of" age, rather than under a plan whose "primary purpose" is to provide for retirement, Congress determined that rights to payment from accounts such as IRAs, which may generally be intended to provide for retirement, but which permit withdrawals at any time without regard to age, are not exempt.[8]

II. Standard IRAs, Like The Ones Held By Petitioners, Are Not "Similar Plans Or Contracts."

The Rouseys' IRAs also are not exempt because they are not "similar" to the "stock bonus, pension, profit-sharing, [or] annuity" plans expressly mentioned in Section 522(d)(10)(E). The Rouseys principally contend that their IRAs are "similar" to those plans because IRAs, like pension plans, are subject to preferential tax treatment. That, however, is the wrong standard by which to measure similarity. The structure and purpose of the statute make clear that the central distinction is between an individual's savings accounts—which are not exempt—and "future earnings," which are. By that measure, IRAs far more closely resemble ordinary savings, and therefore are not exempt.

Exempting the future stream of payments pursuant to a traditional pension plan is consistent with the basic economic

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[8] The Third Circuit has held that a debtor may exempt the right to payment from an IRA once he or she has reached the age of 59½, but not before. *See Clark* v. *O'Neill (In re Clark)*, 711 F.2d 21 (3d Cir. 1983). Because the right to withdraw from an IRA is not linked to age regardless of the debtor's age at the time of the bankruptcy filing, we do not urge the Third Circuit's construction of Section 522(d)(10)(E) on this Court.

arrangement in chapter 7, whereby the debtor turns over his or her available assets to satisfy the claims of creditors, but enjoys a "fresh start" that allows the debtor to retain future income. The legislative history of Section 522(d)(10)(E) confirms this point: "Paragraph (10) exempts certain benefits that are akin to future earnings of the debtor." H.R. Rep. No. 95-595, at 362, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6318. Plans that operate like traditional pension plans—where the employee lacks ready access to the funds—are "similar" to the specified plans. Standard IRAs, however, are quite different, and more closely resemble ordinary savings accounts, as the holder of the account retains the right to withdraw the funds (subject only to a tax penalty). They therefore are not "similar" to the plans specified in Section 522(d)(10)(E) of the Bankruptcy Code.

A. A Standard IRA Is More Like A Savings Account Than A Pension Plan—And Therefore Is Not "Similar" To The Plans Listed In Section 522(d)(10)(E).

The shared feature of the "stock bonus, pension, profit-sharing, [and] annuity" plans identified in the statute is that all provide what amounts to a form of deferred compensation. *See* Dilley, *supra*, 74 Ind. L.J. at 429. That is, the employee lacks present access to or control over the funds. These plans are quite unlike traditional savings accounts—whose proceeds may be withdrawn at any time, and put to any purpose, by the account holder.

By contrast, Congress's express interest in encouraging savings in any form has led banks and other financial institutions to structure the standard IRA so that it may operate very much like a traditional savings account. As one commentator aptly put it, IRAs "have transmogrified . . . into all-purpose investment kitties that can be used for purposes that have little connection to the holder's retirement." Kaplan, *supra*, 7 Elder L.J. at 285.

Account holders may withdraw funds from their IRAs at any time, subject only to a modest tax penalty. And, in addition, Congress now permits withdrawals without penalty from IRAs to buy a house or for health care insurance premiums or education. *See* 26 U.S.C. § 72(t)(2)(D)-(F). As Senator Landrieu explained, IRAs have effectively become savings accounts towards objectives that Congress considers worthy: "If we can encourage people to save for the right things—to purchase a home, for catastrophic health care needs, for education to improve their productivity . . . that is really what this is about." 143 Cong. Rec. S8415, S8438 (daily ed. July 31, 1997).

However laudatory the objective, the result of this liberalization of access to funds in IRAs is that it certainly can no longer be said—if it ever could have been—that these accounts are "similar" to the traditional pension plans enumerated in Section 522(d)(10)(E).

As lower courts in the Eighth Circuit have recognized, the appropriate index of similarity for purposes of Section 522(d)(10)(E) is the extent to which the funds in question are a replacement for future wages, as opposed to ordinary savings that may be used for any purpose. *See, e.g., Eilbert* v. *Pelican*, 212 B.R. 954 (B.A.P. 8th Cir. 1997) (focusing on, *inter alia*, whether the payments were designed to be a wage substitute; contributions were made only by the employer; and the debtor's control over the asset), *aff'd*, 162 F.3d 523 (8th Cir. 1998); *Andersen* v. *Ries*, 259 B.R. 687, 694 (B.A.P. 8th Cir. 2001) (finding that an annuity met the similar plan or contract test where the debtor had no ability to withdraw funds). In short, a right to payment from a plan that is intended to provide replacement wages or another form of deferred compensation may be exempt as a "similar" plan to those specified in Section 522(d)(10)(E), while a right to

payment from a plan that operates more like an ordinary savings account cannot be.[9]

To be sure, other lower courts have engaged the "similarity" analysis at a higher level of generality—concluding that standard IRAs are "similar" to the plans listed in the statute on the ground that both types of plans are "intended," at some level, to provide a form of retirement benefit. *See, e.g., In re McKown*, 203 F.3d 1188, 1189 (9th Cir. 2000) (an IRA is "similar" to the enumerated plans because it is "a device used to provide for retirement" and serves "the public benefit of encouraging people to provide for their own retirement income").

But this broad-brush analysis asks the wrong question. Of course it is true that saving for retirement is a salutary objective. But nothing in the Bankruptcy Code remotely suggests that a debtor may retain savings—simply because he intends to use them in retirement—while failing to pay his creditors. It is not "retirement savings" that are put outside the reach of creditors, only those "right[s] to payment" under plans that are similar to the traditional pension plans listed in the statute. Standard IRAs operate more like ordinary savings accounts, and therefore must be reachable by creditors in bankruptcy.

B. Congress Rejected A Proposed Exemption Statute That Focused On Tax Qualification.

Congress expressly considered and rejected, when it enacted Section 522(d)(10)(E), language that would have exempted any plan that was "tax qualified." Specifically, the 1973 Commission Report, which was Congress' starting

[9] The overall structure of Section 522(d)(10) further demonstrates Congress's purpose of protecting wage replacement devices, not ordinary savings accounts: Subsection (d)(10)(A) exempts social security and public assistance benefits; (d)(10)(B) exempts veterans' benefits; and (d)(10)(C) exempts alimony, support, and separate maintenance. Each of these benefits replaces the debtor's wages after a life-changing event.

point in drafting the 1978 Bankruptcy Code, proposed the following exemption:

> Before or after retirement, such rights as the debtor may have under a profit sharing, pension, stock bonus, annuity, or similar plan which is established for the primary purpose of providing benefits upon retirement by reason of age, health, or length of service, and which is either (A) *qualified under section 401(a) of the Internal Revenue Code*, or any successor thereto, or (B) established by federal or state statute, to the extent in either case the debtor's interest therein is reasonably necessary for the support of the debtor and his dependents.

1973 Commission Report, at 172 (emphasis added).

Following the 1973 Commission Report, but prior to the enactment of the Bankruptcy Code, William T. Plumb, Jr., a special consultant to the Commission and an influential tax scholar,[10] argued that tax qualification should not be a basis for exemption. *See* William T. Plumb, Jr., *The Recommendations of the Commission on the Bankruptcy Laws—Exempt and Immune Property*, 61 Va. L. Rev. 1, 59-60 (1975). He argued that relying on tax qualification is arbitrary because employees have no control over whether a plan comports with the tax code and such qualification should be irrelevant in the bankruptcy context. *See id.*

[10] William Plumb wrote a series of articles at that time involving the intersection of bankruptcy and tax. *See* William T. Plumb, Jr., *The Tax Recommendations of the Commission on the Bankruptcy Laws--Tax Procedures*, 88 Harv. L. Rev. 1360 (1975); William T. Plumb, Jr., *The Tax Recommendations of the Commission on the Bankruptcy Laws--Reorganizations, Carryovers and the Effects of Debt Reduction*, 29 Tax L. Rev. 229 (1974); William T. Plumb, Jr., *The Tax Recommendations of the Commission on the Bankruptcy Laws--Priority and Dischargeability of Tax Claims*, 59 Cornell L. Rev. 991 (1974); William T. Plumb, Jr., *The Tax Recommendations of the Commission on Bankruptcy Laws-- Income Tax Liabilities of the Estate and the Debtor*, 72 Mich. L. Rev. 935 (1974).

Tax qualification, however, is at the heart of petitioners' argument: they argue that their IRAs are exempt because they satisfy the requirements of Section 408 of the Internal Revenue Code (and all IRAs which comply with Section 408 are exempt). But under the version of Section 522(d)(10)(E) that Congress enacted, a plan qualifies for exemption not because it fulfills certain tax requirements, but rather because it is similar to a traditional pension plan that is intended to pay out only upon retirement. Because standard IRAs permit access to the funds at any time, they are not "similar" to the specified plans.

C. Pre-Code Caselaw Supports The Conclusion That IRAs Are Not "Similar" Plans.

When Congress drafted Section 522(d)(10), it intended to exempt only rights to payment that were akin to replacement wages. The legislative history of Section 522(d)(10) confirms that only rights to payment that "are akin to future earnings" are exempt. *See* H.R. Rep. No. 95-595, at 362, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6318. At the time of the enactment of the Bankruptcy Code, the law was clear that a right to payment from a freely accessible source (such as an ordinary savings account or a standard IRA) was not considered "akin to future earnings."

Prior to the enactment of the Code, courts were often asked to decide whether a right to payment was considered "property" within the meaning of the Bankruptcy Act. If a right to payment was considered "property," the bankruptcy trustee was able to reach it for the benefit of creditors. If a right to payment was considered akin to "future wages," however, the debtor was allowed to keep it to make a "fresh start." *Segal* v. *Rochelle*, 382 U.S. 375, 380 (1966); *see also Kokoszka* v. *Belford*, 417 U.S. 642 (1974); *Lines* v. *Frederick*, 400 U.S. 18 (1970).

In *Lines* v. *Frederick*, the Court considered whether accrued, unused vacation pay was such "property" or was outside of the trustee's reach because it was "akin to future earnings." *Lines*, 400 U.S. at 20. The Court determined that vacation pay—which was accessible by the debtor only during vacation (or upon termination)—was akin to future wages. *See id.* at 20.

Four years later, in *Kokoszka* v. *Bedford*, the Court considered whether an income tax refund was also protected as akin to future wages. In determining that such a refund was not akin to future wages, the Court explained that while both vacation pay and an income tax refund share the characteristic of being "wage based," vacation pay was the only property "designed to function as a wage substitute at some future period and, during that future period, to 'support the basic requirements of life for (the debtors) and their families.' . . . This distinction is crucial." *Kokoszka*, 417 U.S. at 648 (citations omitted). "'Just because some property interest had its source in wages . . . does not give it special protection, for to do so would exempt from the bankrupt estate most of the property owned by many bankrupts, such as savings accounts and automobiles which had their origin in wages.'" *Id.* (quoting the lower court opinion).

The same distinction exists in this case between a traditional pension plan, which is designed like vacation pay to replace future wages only at certain times, and a standard IRA, which is not designed to replace wages but to act like a tax-favored savings account to which the debtor has unrestricted access.

III. The "Unless" Clause Does Not Render The Other Provisions Of Section 522(d)(10)(E) Superfluous.

The Rouseys contend that the reference to Section 408 of the Internal Revenue Code in Section 522(d)(10)(E)'s "unless" clause, which excludes from the exemption rights to payment under certain plans established by insiders, demonstrates that all rights to payment from IRAs are exempt.

That assertion is incorrect and contradicted by the very purpose of the exception.

A. The "Unless" Clause Means Only That Some Section 408 Plans Must Be Eligible To Qualify For The Section 522(d)(10)(E) Exemption.

Section 522(d)(10)(E) excludes from exemption certain "insider" retirement plans. Specifically, Subsections 522(d)(10)(E)(i)-(iii) establish three conditions that—if all are satisfied—disqualify a retirement plan from exemption. The statute exempts a "right to payment" from a "similar plan or contract" that arises "on account of illness, disability, death, age, or length of service" "*unless*" it: (1) was "established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose, " 11 U.S.C. § 522(d)(10)(E)(i); (2) was payable "on account of age or length of service," *id.* § 522(d)(10)(E)(ii); and (3) "does not qualify" under Sections 401(a), 403(a), 403(b) and 408, *id.* § 522(d)(10)(E)(iii). Qualification under the provisions of the Internal Revenue Code listed in Subsection (iii) thus operates as a "safe harbor" from the disqualification that the "unless" clause otherwise provides.

The manifest purpose of the "unless" clause in Section 522(d)(10)(E) is to prevent corporate insiders from using their positions to establish self-serving "retirement plans" to shield assets that would otherwise be reachable by creditors. Because tax qualification (which brings with it the requirement that the plan not discriminate in favor of highly compensated employees[11]) carries with it some assurance that

[11] *See* 26 U.S.C. §§ 401(a)(3), (a)(4), (a)(26) (effectively limiting an employer's ability to offer a plan that primarily benefits "highly compensated employees," as defined in the Internal Revenue Code). *See generally* Mary F. Radford, *Implied Exceptions to the ERISA Prohibitions Against the Forfeiture and Alienation of Retirement Plan Interests*, 1990 Utah L. Rev. 685, 700 ("The tax benefits of ERISA are available only to those plans that provide retirement benefits to a fair cross-section of employees and that do not offer disproportionately higher or better benefits to employees who are in privileged positions.").

the plan was established at arm's length, the safe harbor of Subsection (iii) reflects Congress' judgment that the safeguards involved in tax qualification were sufficient to overcome the concern for insider self-dealing that pervades the Bankruptcy Code. *See, e.g.*, 11 U.S.C. §§ 502(b)(4) (disallowing that portion of an insider's bankruptcy claim for services rendered in excess of the value of such services); *id.* § 547(b)(4)(B) (establishing a one-year reach-back period for avoiding a transfer to an insider of the debtor but a 90-day reach-back period for non-insiders).

Petitioners and their *amicus* argue that the reference to Section 408 (Individual Retirement Accounts) in Subsection 522(d)(10)(E)(iii) reflects Congress's intent to protect all IRAs with the exemption. They assert that an IRA necessarily qualifies as a "'similar plan or contract" because if plans established under Section 408 of the Internal Revenue Code did not fall within the ambit of Section 522(d)(10)(E) in the first place, the reference to Section 408 in the "unless" clause would be superfluous.

That is simply incorrect. It is certainly true that the reference to Section 408 in the "unless" clause suggests that *some* plans established under Section 408 could be "similar" plans within the meaning of Section 522(d)(10)(E). But, as described below, that proposition is not disputed. There is certainly no reason that a plan cannot be established that qualifies under Section 408 and that *also* meets the specific requirements of Section 522(d)(10)(E).

But it is quite another thing to suggest that the reference to Section 408 in the "unless" clause means that *all* Section 408 plans are necessarily exempt, regardless of whether the debtor's right to receive a payment under the particular plan in fact satisfies the other statutory requirements—such

as that it arise "on account of illness, disability, death, age, or length of service," and that the plan be "similar" to the types of plans identified in the statute. Indeed, it is the Rouseys' construction of the statute that renders the "on account of" requirement superfluous.

For similar reasons, the dicta in *Patterson* v. *Shumate*, 504 U.S. 753 (1992), does not support the Rouseys' construction of Section 522(d)(10)(E). In *Patterson*, it was argued that pension plans were not intended to be excluded from the bankruptcy estate under 11 U.S.C. § 541(c), because such a construction would render superfluous the exemption for pension plans contained in Section 522(d)(10)(E). This Court, however, rejected that argument, noting that certain IRAs that qualified under 26 U.S.C. § 408 "could be exempted under § 522(d)(10)(E)." *Patterson*, 504 U.S. at 763.

That statement is correct, but by no means supports the Rouseys' position. It is certainly the case that IRAs "could be exempted" under Section 522(d)(10)(E): if an IRA is structured so that the holder of the account is entitled to receive a payment on account of age, that right to payment would be exempt. The reason the Rouseys' rights to payment are not exempt is not because one cannot structure an IRA to fit within the exemption; it is because the Rouseys elected not to do so.

Many types of accounts qualify as IRAs under Section 408, titled "Individual Retirement Accounts," the common thread being tax-deferred savings. *See* 26 U.S.C. § 408. Section 408 lists certain requirements that an account must meet to qualify as an Individual Retirement Account. *See* http://www.irs.gov/publications/p590/ch01.html#d0e1249 (last visited October 24, 2004). If an account, by its terms, does not meet these requirements, the account will not be entitled to preferential tax treatment. Section 408, however, only sets forth minimum requirements to qualify for such beneficial tax status, and does not dictate the specific terms that banks and financial institutions can utilize to establish

IRAs. While the Internal Revenue Code designates consequences for withdrawing funds from an IRA early, *see* 26 U.S.C. § 72(t)(1), it does not mandate unrestricted access.[12]

Section 522(d)(10)(E) establishes its own requirements for an account to qualify for protection from creditors' reach, which are based on bankruptcy policy rather than tax policy. *See* Dilley, *supra*, 74 Ind. L.J. at 415-417, 435-437 (arguing that providing exemption protection for IRAs, based on tax-qualification, does not further bankruptcy policy). If an account, by its terms, does not meet the requirements of Section 522(d)(10)(E), the account cannot be exempted. Thus, qualification for the Section 522(d)(10)(E) exemption must be determined by examining the specific terms of the plan or contract sought to be exempted.

Perhaps it is true, as the Rouseys argue (Br. 10), that all or nearly all of the IRAs that are now offered by banks and financial institutions do not qualify for exemption under Section 522(d)(10)(E). If that is so, however, it merely reflects a market determination that having ready access to savings is more important than structuring the account so that the holder's right to payment from that account will be exempt in bankruptcy. Indeed, IRAs are most commonly structured with features that make them virtually identical to "bank savings accounts with favorable tax treatment." *Huebner* v.

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[12] *See* 26 U.S.C. § 408(a)-(c) (containing no provision that prohibits tailoring IRAs to restrict withdrawals until a certain age); *see also In re Skipper*, 274 B.R. 807, 818 n.8 (Bankr. W.D. Ark. 2002) ("[T]his Court finds no reason why IRAs that meet the 'on account of' requirement cannot be drafted."); *In re Zott*, 225 B.R. 160, 169 (Bankr. E.D. Mich. 1998) ("I believe IRAs can exist which do meet the 'on account of' test of § 522(d)(10)(E). There is nothing in the legislation establishing IRAs or the tax regulations regarding them which prohibits a person from including in the IRA contract [such] a provision."). Section 408(k)(4), which forbids employers from restricting access of employees to their accounts, is the sole exception. 26 U.S.C. § 408(k)(4). There is no reason, however, that such an account could not contain an annuity that pays out only when the account holder reaches a certain age.

Farmers State Bank (In re Huebner), 986 F.2d 1222, 1225 (8th Cir. 1993) (internal quotation marks omitted).

But there is no dispute that an account could be drafted so that the right to receive a payment is triggered by the mandatory "on account of" factors. The Rouseys could have set up their IRAs to restrict their access to the funds until retirement age, but elected not to. For example, an individual could purchase an annuity which is structured so that it pays upon reaching retirement age, thereby providing a replacement for wages during retirement years.

Indeed, that is exactly what the debtor did in *Andersen* v. *Ries*, 259 B.R. 687 (B.A.P. 8th Cir. 2001). She deposited inherited funds into an annuity years prior to the filing of her bankruptcy and elected to begin receiving a fixed monthly payment for the remainder of her life from the annuity. *See id.* at 689. She was accordingly unable to access the corpus of the annuity prior to a specified time, or otherwise alter the timing or amount of the monthly payment. For this reason, the court properly concluded that her right to payment from that annuity fit within the exemption provided in Section 522(d)(10)(E). *See id.* at 690.

The Rouseys, however, made a different choice. They elected to place their funds into an account that they could access at any time, for any reason. Because the Rouseys made that election, rather than the one made by the debtor in *Andersen*, it is neither surprising nor unfair that their accounts are reachable by creditors in bankruptcy.

B. The "Unless" Clause Applies Only To Plans Established By Employers And Therefore Does Not Support The Argument That Rights To Payment Under All Section 408 Plans Are Exempt.

Petitioner's contention that the "unless" clause's reference to Section 408 of the Internal Revenue Code demonstrates that "Section 522(d)(10)(E) exempts IRAs from the bankruptcy estate" (Br. 13), is flawed for an additional rea-

son. As discussed above, the "unless" clause creates an exception to the exemption established by Section 522(d)(10)(E) in order to protect creditors from self-dealing by insiders of the debtor. Accordingly, the "unless" clause excepts only rights to payment under a plan or contract "established by or under the auspices of an insider *that employed the debtor* at the time the debtor's rights under such plan or contract arose." 11 U.S.C. § 522(d)(10)(E)(i) (emphasis added).

As the name implies, however, individual retirement accounts usually are not established by employers, but by individuals—as, indeed, was the case here. *See* 26 U.S.C. § 408(a) (defining an IRA as a trust established "for the exclusive benefit of an individual or his beneficiaries" and requiring that the trustee be a bank or similar approved institution). Only certain specialized types of IRAs can be established by employers. *See id.* § 408(c), (k) (which either existed or was under consideration at the time of enactment of the Bankruptcy Code). And it is therefore only those specialized types of IRAs to which the "unless" clause pertains—not traditional standard IRAs like the one at issue here. Accordingly, the "unless" clause's reference to Section 408 does not permit an inference that rights to payment under ordinary standard IRAs are exempt.

IV. IRAs Are Generally Reachable By Creditors Outside Of Bankruptcy—And Should Be Treated Equally In Bankruptcy.

In *Guidry* v. *Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990), this Court held—outside of the bankruptcy context—that ERISA's strict prohibition on alienation of traditional pension funds barred a judgment creditor from garnishing those funds. But there is no provision of non-bankruptcy federal law that would protect IRAs from execution by creditors. *See Patterson*, 504 U.S. at 763

(noting that IRAs are "specifically excepted from ERISA's antialienation requirement").

In addition, at the time the Bankruptcy Code was enacted, state law generally permitted creditors to enforce judgments against funds in IRAs.[13] Thus, while it is certainly true that many states have amended their exemption statutes over the past 15 years so as to exempt IRAs, it is the state of the law that existed in 1978 that should inform

[13] State statutes and courts treated IRAs and self-settled Keogh plans (a Keogh plan is another type of individual plan that permitted unrestricted access at the time of the enactment of the Bankruptcy Code) similarly and failed to protect them from a judgment creditor's levy, garnishment, or execution. *See* Del. Code Ann. tit. 10, § 4902 (1978) (Delaware) (not exempting any rights under retirement plans); Ill. Rev. Stat. ch. 52, § 13 (West 1979) (Illinois) (only exempting certain government pensions); Ind. Code Ann. § 34-2-28-1 (West 1976) (Indiana) (not exempting any rights under retirement plans); Me. Rev. Stat. Ann. tit. 14, § 4401 (repealed) (West 1981) (Maine) (not exempting any rights under retirement plans although certain government pensions are listed in other statutes); N.H. Rev. Stat. Ann. § 512:21 (1989) (New Hampshire) (only exempting certain government pensions); N.Y. C.P.L.R. § 5205(c) (McKinney 1978) (New York) (only protecting trusts not created or settled by the debtor); R.I. Gen. Laws 1956, § 9-26-4 (1985) (Rhode Island) (not exempting any pension rights); *Judson* v. *Witlin (In re Witlin)*, 640 F.2d 661, 663 (5th Cir. Unit B Mar. 1981) (Florida) (self-settled Keogh found not exempt); *In re Talbert*, 15 B.R. 536, 537-38 (Bankr. W.D. La. 1981) (Louisiana) (failing to exempt an IRA); *Aronsohn & Springstead* v. *Weissman*, 552 A.2d 649, 651-652 (N.J. Super. Ct. App. Div. 1989) (superseded) (self-settled Keogh found not exempt) (superseded by statute); *Fordyce* v. *Fordyce (In re Fordyce)*, 365 N.Y.S.2d 323, 328 (N.Y. Sup. Ct. Nassau County 1974) (failing to exempt that portion of pension plan that was self-settled) (superseded by statute); *In re Goldberg*, 59 B.R. 201, 206-207 (Bankr. N.D. Okl. 1986) (Oklahoma) (failing to exempt self-settled Keogh) (superseded by statute); *In re Mace*, 4 B.C.D. 94, 95 (Bankr. D. Or. 1978) (Oregon) (failing to exempt an IRA); *In re Lowe*, 25 B.R. 86, 88-89 (Bankr. D.S.C. 1982) (South Carolina) (failing to exempt an IRA); *In re Peeler*, 37 B.R. 517, 517 (Bankr. M.D. Tenn. 1984) (failing to exempt an IRA); *In re Howerton*, 21 B.R. 621, 623-624 (Bankr. N.D. Tex. 1982) (Texas) (finding a IRA not exempt); *Ferwerda* v. *Zievers (In re Ferwerda)*, 424 F.2d 1131, 1332-1333 (7th Cir. 1970) (Wisconsin) (failing to protect a Keogh).

the construction of Section 522(d)(10)(E). *See Field* v. *Mans*, 516 U.S. 59, 72-75 (1995) (in construing provision of the Bankruptcy Code that operated against backdrop of state law: "we will look to the concept of 'actual fraud' as it was understood in 1978 when that language was added to § 523(a)(2)(A)").[14]

Because IRAs are not shielded from the reach of creditors under federal law outside of bankruptcy—and because at the time Section 522(d)(10)(E) was drafted, they generally were also reachable by creditors under state law[15]—it would be anomalous to ascribe to Congress an unspoken intent to render these same accounts, in bankruptcy, exempt from the reach of creditors.

[14] The structure of exemption law under the 1978 Bankruptcy Code demonstrates a heavy deference to the state law of exemption—permitting debtors to choose the state exemptions rather than those specified in the Bankruptcy Code, 11 U.S.C. § 522(b)(2); and—more significantly—permitting states to opt out of the federal exemptions altogether. *See* 11 U.S.C. § 522(b)(1).

[15] *See Employee Retirement Pension Benefits as Exempt from Garnishment, Attachment, Levy, Execution or Similar Proceedings*, 93 A.L.R.3d 711, 755-760 (1979) (discussing the state of pension exemption law and devoting the majority of the discussion to the protection of various types of government pensions). Private (non-government) pensions were protected only to the extent of the employer's contribution and self-settled private pension plans received little protection. *See id.* at 759-760 (discussing *Lerner* v. *Williamsburg Sav. Bank*, 386 N.Y.S.2d 906 (NY Civ. Ct. 1976) as a representative case not protecting a self-settled pension plan because the funds were contributed by the debtor and were at all times accessible by the debtor). *See also* Karen Rubner Grotberg, Comment, *There Should Be Parity in Bankruptcy Between Keogh Plans and Other ERISA Plans*, 80 Nw. U. L. Rev. 165, 171-172 (1985) (comparing the treatment of Keoghs and IRAs by courts).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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